

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF THE CITY OF LEE'S SUMMIT, MISSOURI

The City of Lee's Summit, Missouri ("Lee's Summit" or "the City") files these comments in response to the Notice of Inquiry ("NOI"), released April 7, 2011, in the above-referenced proceeding. These comments are intended to provide the Commission with an overview of Lee's Summit's local right-of-way and facility management practices and charges.¹ Lee's Summit has developed considerable expertise applying its policies to protect and further public safety, economic development, and other community interests, and these policies are consistent with pertinent state law that was enacted at the request of the telecommunications and cable television industries. Lee's Summit believes that that the Commission should not interfere with these policies by adopting rules in this area. By adopting rules in this area, the Commission could disrupt well established and successful processes at substantial cost to local taxpayers and

¹ Due to the broad nature of how the Commission use the term "charges" in the NOI, these Comments use the term so as to include both any cost recovery that is part of right-of-way and facility management (such as permitting fees), as well as other compensation the City may receive from communications companies for use of the rights-of-way and other facilities consistent with state and local law.

to the local economy. The City believes that a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission's limited expertise on local land use matters all lead to the conclusion that this is no place for federal regulation.

Lee's Summit is a high-growth suburban community located in the Kansas City Metropolitan Area in Western Missouri. Lee's Summit encompasses a total geographic area of over 65 square miles and the population as shown by the 2010 Census is 91,364. Lee's Summit's tax base is largely residential and the City is continually working on ways to promote retail and commercial development. Through the prudent use of economic incentives the City has encouraged the steady growth of the retail and commercial presence in Lee's Summit and continued growth in these sectors is a continuing goal of the City. The presence of adequate broadband service within the City is important to meeting this goal.

Lee's Summit has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service is available to all of the households in Lee's Summit, generally in the form of wired broadband services provided by Time Warner Cable, Comcast cable, and AT&T's U-Verse. Wireless broadband services are deployed throughout the City usually through placement of wireless facilities on privately owned towers. Some wireless facilities are located on City owned communications and water towers. Broadband service is also readily available to local businesses, although anecdotal evidence suggests that some business owners desire a higher level of broadband service than what is currently available. There is no evidence that Lee's Summit policies or charges with respect to placement of facilities in the rights-of-way or on City property have discouraged broadband deployment. Lee's Summit welcomes broadband deployment, and the City's policies allow it to

work with any company willing to provide service. No company has cited the City's policies as a reason that it will not provide service. The City's policies help to avoid problems and delays in broadband deployment. For example, the City's comprehensive Right-of-Way Management Ordinances put controls in place that reduce damage to existing facilities and ensure that negative impacts on other right-of-way users and the general public are minimized. While some entities seeking access to our rights-of-way and facilities may prefer to live without rules or regulations, to the great detriment of other users, abutting landowners, commuters, and the general taxpayer, City staff believes that most reputable providers appreciate the City's policies in this area.

In response to the NOI, Lee's Summit provides the following information:

I. *Application Procedures, Forms, Substantive Requirements, and Charges.*

The Commission asks whether all necessary application procedures, forms, substantive requirements, and charges are readily available.²

Sections 67.1830-67.1846 of the Revised Statutes of Missouri, which are collectively referred to as "Missouri's public right-of-way law," significantly limit the ability of municipalities to manage and regulate their rights-of-way. Lee's Summit's right-of-way management procedures, otherwise referred to as the Right-of-Way Management (ROW) Ordinances, are codified as sections 26-101 to 26-240 in the City's Code of Ordinances and are based upon Missouri's public right-of-way law. The ROW Ordinances are available online and can easily be accessed through the City's internet web page. The purpose behind the ROW Ordinances is explained in section 26-102 of the City's Code, which provides that the ROW Ordinances were enacted to:

² NOI ¶ 14.

- A. Manage the right-of-way to allow efficient location of facilities and maximize services to the citizens of the City.
- B. Allow for the maximum utilization of the City's right-of-way [ROW] to meet the increasing demands due to technological innovations.
- C. Maintain a competitively-neutral policy to ROW-users and allow the citizens of the City to receive the benefits of market competition.
- D. Facilitate orderly construction and maintenance of facilities in the right-of-way, reduce damage to the facilities of ROW-users, and minimize disruption of service to the citizens of the City.
- E. Encourage responsible construction and maintenance practices in the City right-of-way.
- F. Ensure proper restoration of the City right-of-way pursuant to construction and maintenance of right-of-way facilities.
- G. Minimize the physical disruption of the right-of-way and maintain the aesthetic quality throughout the City.
- H. Minimize any impact to vehicular or pedestrian traffic within the right-of-way.
- I. Protect the health, safety and welfare of the citizens of the City.

In summary, the ROW Ordinances provide that any person using City owned right-of-way for excavation or work, including work related to facilities located or to be located in the right-of-way, must register with the City and secure a right-of-way permit for such work. There are exceptions to the permit requirement for such things as routine maintenance. The right-of-way permit fee, discussed in greater detail below, is nominal. With respect to work associated

with the installation and operation of broadband facilities in the right-of-way, the registration and permitting processes allows City staff to ensure that: the structural integrity of the paved portion of the right-of-way is not compromised; that facilities do not conflict with each other; that traffic disruption is minimized and safety to the public maximized; that all work is done in accordance with all applicable engineering codes; that the drainage of stormwater is not compromised; and that corridor space is used in efficient manner so that adequate space is available for all providers.

The City has no formal policies or Code provisions explicitly covering the placement of facilities on City owned property. Past discussions with providers of wireless telecommunications services revealed that wireless providers are generally looking to locate their facilities on light poles or traffic signal poles. Many of the traffic signal poles and most of the light poles in Lee's Summit are owned by third parties. The City currently has no arrangement with wireless providers for the placement of wireless facilities on City owned light poles or traffic signals. Again, this is most likely due to the fact that most light poles and traffic signals in Lee's Summit are not owned or managed by the City. The City has four active leases with providers for the location of wireless facilities on water towers and seven active leases for the location of wireless facilities on City owned communications towers. These matters have been individually negotiated upon request by the providers. In such instances City staff looks to ensure that the City's infrastructure can support the facilities and to that end an engineering analysis is required before placement on a City owned tower. Staff will also require an interference study to be performed to ensure that added facilities do not conflict with any existing facilities. Public safety remains the top priority since water towers provide potable water and the communications towers are used in the handling of police and fire emergencies.

II. *Sources of Delays.*

The Commission asks what factors are responsible to the extent applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.³

In Lee's Summit most applications are processed very quickly. With respect to right-of-way permitting, the process can be handled online resulting in quick results. Zoning and land use applications move along a prescribed timeframe that helps to ensure consistent results. A typical special use permit, such as would be needed for addition of wireless facilities to an existing tower, would typically be processed within 90 days of receipt of the complete application. Delays are rare and they are typically the result of an applicant failing to submit a complete application.

III. *Improvements.*

The Commission asks whether there are particular practices that can improve processing.⁴

Lee's Summit has recognized a number of practices that have improved the process. For example, the City Code is available online as is complete contact information for all City departments involved in the right-of-way, development, and zoning approval processes. Right-of-way permits can be obtained online as well. Zoning and land use matters generally begin with

³ *Id.*

⁴ NOI ¶¶ 14, 29.

an informal meeting between a potential applicant and the City's Development Review Committee which is comprised of multiple City Departments involved in the review process. This allows a potential applicant to gain valuable insight into the application process as well as the information that City staff will be reviewing and the codes that they will be applying.

Lee's Summit also recognizes that there are applicant practices that can significantly impact the timeframe for approval processes. Most compelling is the submission of a complete application. On occasion an applicant will submit an incomplete application which will generally cause delays in the approval process. Another consistent problem is the failure of applicants (or their subcontractors) to utilize Missouri's "One-Call" utility location system. This service, which is free and required by state law, allows utilities to mark the location of underground facilities within 3 days of contact. Its use greatly reduces the occurrence of damaged facilities and the resulting delays to the applicants work and the City's ability to properly control traffic.

IV. *Permitting Charges.*

The Commission seeks data "on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees."

Specifically, the Commission asks commenters to identify:

- the type of facilities for which such charges are assessed;
- how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees);
- whether the community is subject to comprehensive state franchising or rights-of way-laws;

- whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and
- the value of any in-kind contributions required for access or permit approval.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.⁵

As will be described in greater detail below, the answer to this question is “yes”.

A. “the type of facilities for which such charges are assessed”

There are no City charges that directly apply to broadband facilities. Charges may apply indirectly depending on where the facilities are located and the applicable process involved.

Right-of-way permit fees apply anytime that work, including work by a provider of broadband services, is performed in the right-of-way. Video service providers also provide a general fee for use of the City’s right of way in accordance with Missouri’s 2007 Video Services Providers Act which is codified at sections 67.2675 to 67.2714 of the Revised Statutes of Missouri. This legislation was requested by video service providers in order to gain a statewide franchise in lieu of multiple negotiated franchises in the jurisdictions in which they provide service.

Application fees for zoning related matters are needed for applications for special use permits or preliminary development plans. Both of these items can be required in order for a provider to locate facilities.

To the extent that rentals for the lease of property or space on infrastructure are considered “charges”, there are rentals associated with the lease of space on City owned property such as a water tower or communications tower.

⁵ NOI ¶ 17.

B. “how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees)”

Charges depend on where the facilities are installed. For facilities installed on private property, the only charges are the applicable zoning fees. For installation of facilities on an existing tower, a final development plan is required which has an application fee of \$600. Construction of a new tower would also require the approval of a special use permit which has an application fee of \$900. These fees are set at a level to help cover the cost of staff time involved in the processing of such applications. Applicants are also required to cover out-of-pocket expenses associated with the City’s review of these matters, such as the publication costs associated with the publicizing of notices in local newspapers when required by law. This fee is currently \$165. Applicants may also be required to pay the cost of the City’s outside consultant when technical reviews of applications that exceed City staff’s level of expertise arise. These costs average about \$4,000.

For the installation of facilities within the right-of-way the right-of-way permit fee applies. This fee is calculated on a per City block basis, not to exceed continuous linear work of more than 660 feet. The current rate of this fee is \$60 per City block. In accordance with applicable ordinances and state law this fee is determined from the view point of recovering the City’s actual costs in managing its right-of-way. The amount of this fee does not even come close to recouping the amount of City staff time involved in processing and handling these matters. As mentioned elsewhere in these Comments state law creates a fee payable by video service providers for use of public right-of-way. The fee is 5% of each provider’s general revenues generated within the City.

Finally, there are instance in which wireless providers will request to locate facilities on City owned property, such as water towers or communications towers. Upon request by a provider the City will negotiate a lease with the requesting provider. These amounts are negotiated directly with the provider and generally the amounts do not deviate significantly from what is proposed by the provider. The average annual rental for these leases is approximately \$20,000. A final development plan is also required in these instances. The City has never had a provider walk away because it believed the terms to be too onerous.

“C. whether the community is subject to comprehensive state franchising or rights-of way-laws”

Missouri’s 2007 Video Services Providers Act, cited above, provides comprehensive state franchising of video services providers. “Video service” is defined by the Act as

the provision of video programming provided through wireline facilities located at least in part in the public right-of-way without regard to delivery technology, including Internet protocol technology whether provided as part of a tier, on demand, or a per-channel basis. This definition includes cable service as defined by 47 U.S.C. Section 522(6), but does not include any video programming provided by a commercial mobile service provider defined in 47 U.S.C. Section 332(d), or any video programming provided solely as part of and via a service that enables users to access content, information, electronic mail, or other services offered over the public Internet. *Section 67.2677(14), RSMo. (2008)*

The Act provides that video service providers may obtain video service authorization to operate in various municipalities and such authorization confers the ability to construct and maintain video service infrastructure within the rights-of-way of the covered municipalities to the extent

that such authority was not already granted by prior franchise agreements. *Section 67.2679.8(2)*, RSMo. This right to use the right-of-way is tempered by the providers' responsibility to comply with applicable right-of-way management laws, including Missouri's public right-of-way law, cited above. This law allows public utilities, including broadband service providers, to use public rights-of-way subject to the limited ability of the public owner's ability to manage its right-of-way and recover certain limited right-of-way management costs. The City accomplishes this through its Right-of-Way Management Ordinances mentioned above. The only fee generated from these ordinances is the right-of-way permit fee discussed in greater detail above.

D. "whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions"

The zoning related fees and the right-of-way permit fee are all published in the City's Schedule of Fees and Charges and are available online through the City's internet web page. As discussed above they are intended to recover actual costs.

Any terms or conditions associated with the zoning related approvals are done pursuant to the City's zoning ordinance which is officially known as the Unified Development Ordinance. The Unified Development Ordinance is compliant with applicable state and federal law relating to zoning and land use matters, including the Federal Telecommunications Act. Likewise, the terms and conditions associated with the City's Right-of-Way Management Ordinance are based upon permissible right-of-way management activities allowed under state law.

Terms and conditions contained in leases with service providers for placement of facilities on City owned towers are customary for the industry and negotiated on a case-by-case basis.

E. “the value of any in-kind contributions required for access or permit approval”

The City does not require in-kind contributions as a prerequisite for access or permit approval, but would certainly consider such offers if presented by a service provider wishing to locate facilities on City owned infrastructure.

V. *Local Policy Objectives.*

The Commission asks what “policy goals and other objectives” underlie the local practices and charges in this area.⁶

The City’s goal behind all of the fees mentioned in these Comments is to recover its actual costs. The City does not use these fees as a source of revenue to pad its general fund. With regard to rentals for the lease of space on City owned towers, the City’s primary goal is to recover the costs associated with managing and mitigating the impact on its infrastructure caused by placement of third-party facilities and to help cover the costs associated with maintaining such infrastructure.

The City’s goals and objectives with respect to the various permitting and approval processes discussed in these Comments differ according to the permit or process involved. For example, application of the Right-of-Way Management Ordinances is done with the following goals in mind: to ensure public safety; avoid traffic disruption; maintain and repair roadways; prevent public disruption and damage to abutting property; minimize accelerated deterioration to roads that accompanies street cuts; and avoid damage to the property of others.

The general goal associated with the land use and zoning approvals and permits concerns the proper development of land and related matters so as to promote the public safety, health, and general welfare of the community. More specifically, section 10.600.B of the City’s Unified Development Ordinance lists the following goals related to the siting of communications towers and related infrastructure:

1. Encourage the location of towers, where necessary, in non-residential areas;
2. Encourage the joint use of new and existing telecommunications tower sites and other antenna structures;

⁶ NOI ¶ 22.

3. Encourage telecommunications towers, other antenna structures, and antennas to be configured in a way that minimizes the adverse visual impact of those structures;
4. Encourage users of telecommunications towers, other antenna structures, and antennas to configure them in a way that minimizes the adverse visual impact of those structures;
5. Enhance the ability of the City to ensure that wireless telecommunications services are provided to the community quickly, effectively, and efficiently;
6. Minimize the potential adverse effects of telecommunication towers through the implementation of reasonable design, landscaping, and construction practices;
6. Conform to Federal and State laws that allow certain antennas to be exempt from local regulations.

VI. *Possible Commission Actions.*

Finally, the Commission asks what actions the Commission might take in this area.⁷

As noted above, Lee's Summit strongly urges the FCC to refrain from regulating local right-of-way management and facility placement processes. These are highly fact-specific matters, which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. These matters are managed by local staffs with considerable expertise. Imposing a federal regulatory regime would create unnecessary costs and would have the potential to undermine important local policies. If the Commission feels compelled to act in this area at all, it should limit itself to voluntary programs and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

⁷ NOI ¶ 36.

CONCLUSION

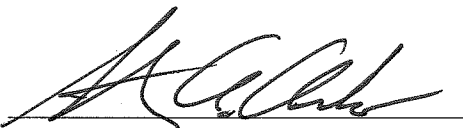
Lee's Summit urges the Commission to conclude that right-of-way and facility management and charges are not impeding broadband deployment. As indicated above, Lee's Summit's policies and procedures are designed to protect important local interests, and have done so for many years. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community.

Lee's Summit hopes that these Comments prove helpful to the Commission in addressing the concerns listed in the NOI. If there any questions about these Comments, or if the Commission would like further information, please contact Deputy City Attorney John Mautino at (816) 969-1412.

Respectfully submitted,

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